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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1254

RUBY MAYFIELD, ADMINISTRATRIX OF THE ESTATE OF REUBEN THOMAS, DECEASED,

Petitioner,

vs.

KANSAS CITY LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF SUPPORTING SAME.

(Opinion Below Appended.)

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(Opinion Below Appended.)

PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF MATTER INVOLVED.

Petitioner, as administratrix of the estate of her deceased uncle, Reuben Thomas, sued Respondent to recover a money judgment upon about $29,000 of annuity contracts which Respondent had issued to her decedent. She prosecuted this action by direction of the Indiana court whose

administratrix she was. (R. 287-288). She sued in the Indiana state court and Respondent removed the case to the United States District Court for the Northern District of Indiana on account of diversity of citizenship. (R. 1.)

In a jury trial, at the close of Petitioner-plaintiff's evidence, the District Court sustained Respondent-defendant's motion for a directed verdict in its favor on the ground of alleged insufficiency of Petitioner-plaintiff's evidence, (R. 253-254), and entered judgment for Respondent-defendant. (R. 342-343.) Petitioner appealed to the Seventh Circuit Court of Appeals, which affirmed, as reported in:

Mayfield v. *Kansas City Life Ins. Co.*, 158 F. (2d) 331.

Civil conspiracy was Petitioner's basic cause of action below. The case was tried on her tenth paragraph of complaint (R. 41-44) which charged, and her evidence (R. 104-335) abundantly proved, the following facts:

Petitioner's eighty-year-old decedent, Reuben Thomas, had invested $29,000 of his money with Respondent, for which it issued to him these annuity contracts. He was a farmer in rural Missouri, a man of very limited schooling, barely able to write a letter (R. 291), and this money was a large part of his total assets. It was his intention to have the money due on these contracts paid at his death to *two* men, as co-payees, his trusted country banker friend, Sheppard, and his second cousin, Charles Lester Thomas. These two were to receive it as his trustees, for the purpose of paying some small designated gifts to decedent's cemetery association and to some of his "poor relations" and then to turn the bulk of the $29,000 over to his estate, from whence it would go to his sole heir, his niece, Ruby Mayfield. Respondent's agent, Holliday, who

handled Respondent's dealings with this old decedent, *conspired* with one of the payees, the second cousin, Charles Lester Thomas, to *manipulate* these contracts so as to get the name of the other co-payee, Sheppard, *off* the contracts, so that the money could be collected solely by this second cousin after decedent's death, and pocketed as his own money. This conspiracy was successfully carried out by the two conspirators by a series of *manipulations* and *forgeries* which they practiced on decedent and on the contracts before his death, so that the second cousin was able to collect and keep the $29,000 as his own after decedent's death. These manipulations and forgeries were uncovered and proven by Petitioner-plaintiff at the trial with great expense and labor, the proof consisting in part of forged documents forced out of Respondent's files by order of court. (R. 47, 53, 57). Their forged character was proven by Petitioner-plaintiff's expert witness, a man of high skill and integrity in that field, Mr. Herbert J. Walter of Chicago, who often serves the United States Government in like capacity. (Walter's testimony: R. 206-252. Forgeries exhibited: Plaintiff's Exhibits 33-42, R. 325-334).

Having shown the *injury* to decedent's estate by the above proof, Petitioner showed Respondent's *liability* to pay therefor by the following proof:

Direct notice of the above conspiracy, and *demand* not to *pay out* to the conspirators, were given by Petitioner and her attorney at Respondent's *home office,* to its highest officials, before they paid out this $29,000. One of the *forgeries* was then *exhibited* to them, which on its face was attested as genuine by Respondent's *own* conspiring *agent,* Holliday. Respondent's home office officials then promised to comply with this notice and demand not to pay out. (R. 143, 167-168). The above oral notice was a

confirmation and amplification of an earlier written demand not to pay out, which Petitioner's attorney had made to Respondent's home office. (Plaintiff's Exhibit 19, R. 308, introduced at R. 197.) The above notices to the *home office* were entirely *apart* from any question of whether the knowledge of the *agent*, Holliday, would be *imputed* to Respondent, as discussed in the opinion below. This renders the agency question moot. Besides the above notice and demand after decedent's death and before the pay-out, Respondent's home office had notice even *before* decedent's death that the money payable on these contracts was affected by a *trust*, because decedent had executed a memorandum in Respondent's *home office*, directing how he wanted the money disposed of and had left this memorandum in Respondent's hands. (R. 120-121, 138, 322.)

But two days after the above oral notice and demand not to pay out, and after promising to comply therewith, Respondent went ahead and delivered the pay-out checks through the hands of its conspiring agent, Holliday, to the conspiring payee, Charles Lester Thomas, and accepted his receipt as satisfaction of the contracts. (R. 261, bottom; 265 bottom; 278 middle; 282 middle.) Then the conspiring payee did not deposit the four pay-out checks in the normal business manner but went around and cashed one check in each of four different towns, as shown by the bank endorsements on the back of the checks. (Plaintiff's Exhibits 23-26, R. 311-314, introduced at R. 202.)

Defendant made no attempt to deny the above notice, demand and promise at its home office, nor to explain its peculiar conduct of paying out contrary thereto. It moved for a directed verdict at the close of Petitioner-plaintiff's evidence on the ground that there was no evidence of such knowledge on its part (R. 254, pars. 3-5) and the District Court sustained its motion. (R. 255, 342.)

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction exists under Title 28, Sec. 347(a), Judicial Code, Sec. 240, amended, giving this Court jurisdiction to review "any" case by certiorari to a Circuit Court of Appeals.

QUESTIONS PRESENTED.

1. Was Petitioner-plaintiff's right of jury trial infringed by directing the verdict against her at the close of her evidence, primarily in view of the Constitutional guaranty, and Secondarily in view of Federal Rule of Civil Procedure 50 (b).

2. **A further question touching the administration of justice, which concerns the courts as much at its does Petitioner:**

This being a civil conspiracy and fraud case, unlike negligence cases, have the lower courts unwittingly *ratified* a successful conspiracy and fraud?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

Petitioner-plaintiff's constitutional right to jury trial was infringed, because:

A.

There was ample evidence, both direct and circumstantial, entirely uncontradicted by defendant, from which the jury could have inferred and found (1) that the payee was in fact a trustee of this money as between himself and decedent, (2) that a conspiracy existed between the payee and Respondent's agent, for the payee to misappropriate this money as his own, and (3) Petitioner gave Respondent's *home office* direct *notice* and *demand* not to pay out to the conspirators, and *exhibited* one of the conspirators' *forgeries* to the home office, and thereafter, Respondent *aided* the conspirators to carry out their conspiracy by paying out the money to them. See summary of facts in our Statement of Matter Involved, supra. See also detailed analysis of evidence and law in attached Brief.

B.

Apart from all other legal questions, Respondent is liable on the simple proposition of law and honesty that one knowing of, or chargeable with notice of, a conspiracy to misappropriate money, is under a duty *not to aid* the success of the conspiracy by paying over the money to the conspirators,—particularly in the face of a contrary

demand by an adverse claimant. This Court has held it was error to withdraw a case of this type from the jury:

Russell v. *Post* (1891), 138 U. S. 425 (end of opinion), 11 S. Ct. 353, 355; 34 L. Ed. 1009.

Manhattan Life Ins. Co. v. *Cohen* (Tex. Civ. App.) 139 S. W. 51, 56, par. 2 (appeal dismissed, 234 U. S. 123).

O'Donnell v. *Metropolitan L. Ins. Co.*, 11 Del. Ch. 4, 95 Atl. 289, 290, par. 1.

McGrew v. *New York Mut. L. Ins. Co.*, 132 Calif. 85, 64 Pac. 103, 106 (writ of error dismissed, 188 U. S. 291).

Metropolitan L. Ins. Co. v. *Lewis*, 14 Ga. App. 10, 80 S. E. 17, 18, par. 2.

Restatement—Trusts—Section 297.

Restatement—Trusts—Section 321, paragraphs (d) and (e).

Restatement—Trusts—Section 326.

Respondent's violation of the above duty by paying the money to the conspirators contrary to Petitioner's adverse demand, was particularly inexcusable and suspicious, since, for reasons it did not choose to explain at the trial, *it ignored the plain remedy of interpleading* the payee and Petitioner, which would have given safety to it and justice to all. This remedy was open to Respondent in the courts of its own state, where both claimants then were, and if any claimant were in another state the federal interpleader statute was available to it.

Smith v. *Grand Lodge*, 124 Mo. App. 181, 101 S. W. 662, 669.

33 C. J.—Interpleader—page 433, Section 16.

30 Amer. Jur.—Interplead—Section 5, page 216.

28 U. S. C. A. 41 (26).

The fact that the contracts on their face purported to be payable to one of the adverse claimants (cousin) did not defeat Respondent's right to interplead the claimants, nor relieve it of the duty of answering to the rightful claimant if it ignored interpleader and chose to pay to the wrong one.

Love v. *Hartford Life Ins. Co.*, 153 Mo. App. 144, 231 S. W. 335, 337, 338.

C. Schmidt & Sons Brewing Co. v. *Pittsburgh Life, etc., Co.*, 256 Pa. 363, 100 Atl. 959, 960, par. 2.

First National Bank v. *Reynolds* (1928), 127 Me. 340, 143 Atl. 266, 60 A. L. R. 712, 715, top second col.

Marsh v. *Mutual Life Ins. Co.*, 200 Ala. 438, 76 So. 370, 371.

C.

This Court grants certiorari where necessary to review "important problems as to the petitioner's right to a jury determination" of fact issues. The test is that all reasonable inferences which the jury might draw from the evidence in favor of plaintiff must be taken as true, as against a directed verdict for defendant at the close of plaintiff's case.

Tennant v. *Peoria & P. U. Ry. Co.* (1944), 321 U. S. 29, 30, 35; 64 S. Ct. 409, 410, 412, pars. 7, 8.

Tiller v. *Atlantic Coast Line R. Co.* (1943), 318 U. S. 54, 67-68; 63 S. Ct. 444, 459, par. 10.

Rule of Civil Procedure 50(b) contemplates that, except in the clearest cases, District Courts should not direct verdicts at the close of a plaintiff's case, but should receive all the evidence so that the full facts may be available to the parties and reviewing courts on appeal,—particularly

in a case of civil conspiracy and fraud where the nature of the case compels the plaintiff to rely on circumstantial evidence which it is peculiarly the province of the jury to weigh.

Fratta v. *Grace Line, Inc.* (C. C. A. 2), 139 F. (2d) 743, 744.

Rule of Civil Procedure 50 (b).

II.

A Successful Conspiracy Has Been Unwittingly Ratified by the Courts Below.

This is apparent from the peculiar and incongruous facts and statements *on the face of the opinion below*, as analyzed in the attached brief. It is still more apparent from the *documentary* evidence and *forgeries* in the record, as analyzed in the brief.

Being a civil conspiracy case, this is unlike negligence cases where the tort, at worst, is not tainted with illegality and usually involves only a weighing of negligence on both sides. The thing involved in this is either black or white,—a successful conspiracy to steal this old decedent's money, or not.

Public policy, the dignity of the federal courts, and the proper administration of justice therein, requires that this case be *scrutinized* to make sure that a successful conspiracy shall not get by, and receive the stamp of approval of, the federal courts.

The opinion below *gives a clean bill of health* not only to Respondent but also to its conspiring agent, Holliday, and to the conspiring payee, Charles Lester Thomas. The opinion says that decedent had so little affection for this payee that when the latter sought shelter in decedent's

house, decedent let him stay there, but declared that he "would do it for a dog" (Opinion, R. 360, top). Yet the opinion goes on to hold there was no evidence that this payee was not intended by decedent to get a *gift* of this $29,000 as sole payee, to keep for himself. The opinion also *condones* and treats as *harmless,* proven *forgeries* committed by the two conspirators (R. 361-362), by saying that "these alleged forgeries do not show an intent on the part of Charles L. Thomas to defraud plaintiff, nor was she injured in any way by them" (R. 363, bottom).

Petitioner has exposed this fraudulent conspiracy at great labor and expense. The proof of it appears on the face of the opinion below, and still more so in the record. She respectfully urges this Court to review this case, not only for her benefit, but also in the public interest,—to prevent a successful conspiracy from getting by the federal courts.

WHEREFORE, Petitioner prays this Court's writ of certiorari may issue to review this case, and for all proper relief in the premises.

OWEN W. CRUMPACKER,
GEORGE COHAN,
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Attorneys for Petitioner.

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BRIEF SUPPORTING PETITION FOR CERTIORARI.

SUMMARY.

I.

Petitioner-plaintiff's right to jury trial was infringed, because:

A.

There was ample evidence of a conspiracy between Respondent's agent, Holliday, and the payee, Charles Lester Thomas, for the latter to steal this $29,000.

There was also positive uncontradicted evidence that Respondent's home office *aided* the successful completion

of this conspiracy by paying out the money to the conspirators after Petitioner's counsel gave the home office *notice* of the conspiracy and a *demand* not to pay out.

B.

Regardless of any liability that might be predicated on the agency of Holliday, Respondent is liable under the simple principle of law and honesty, that one who knowingly *aids* the consummation of a conspiracy by paying out money to conspirators which equitably belongs to their intended victim, is liable to the victim.

Russell v. *Post* (1891), 138 U. S. 425 (end of opinion), 11 S. Ct. 353, 355; 34 L. Ed. 1009.

Manhattan Life Ins. Co. v. *Cohen* (Tex. Civ. App.), 139 S. W. 51, 56, par. 2 (appeal dismissed, 234 U. S. 123).

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to all. This remedy was open to Respondent in the courts of its own state, where both claimants then were, and if any claimant were in another state the federal interpleader statute was available to it.

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This Court grants certiorari where necessary to review "important problems as to the petitioner's right to a jury determination" of fact issues,—the test being that all reasonable inferences which the jury might draw from the evidence in favor of plaintiff must be taken as true, as

against a directed verdict for defendant at the close of plaintiff's case:

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Rule of Civil Procedure 50(b) contemplates that, except in the clearest cases, District Courts should not direct verdicts at the close of a plaintiff's case, but should receive all the evidence so that the full facts may be available to the parties and reviewing courts on appeal,—particularly in a case of civil conspiracy and fraud where the nature of the case compels the plaintiff to rely on circumstantial evidence which it is peculiarly the province of the jury to weigh.

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Rule of Civil Procedure 50 (b).

II.

A Successful Conspiracy Has Been Unwittingly Ratified by the Courts Below.

This is apparent on the face of the opinion below which *condones* proven forgeries as being *harmless,* and which states facts which add up to a conspiracy and then ignores them. The conspiracy is still more apparent from further forgeries and documents not mentioned in the opinion.

Public policy, and proper administration of justice in the lower federal courts, calls for a review by this Court, and an opportunity for jury trial of these charges, *so that a successful conspiracy shall not get by the federal courts*

and receive their stamp of approval, as was done here by the District Court's action of directing a verdict for Respondent-defendant and by the Circuit Court of Appeals' opinion giving a clean bill of health, not only to Respondent but to its conspiring agent and the conspiring payee.

ARGUMENT.

I-II.

The above propositions I and II are closely related. The *nature* of the case requires that this Court scrutinize the evidence—not for the purpose of fact-finding, as such, which this Court will not do—but in order to determine the fundamental questions: has Petitioner been denied her constitutional right of jury trial, and have the lower courts unwittingly ratified a successful conspiracy and fraud? The questions of law are simple and self-apparent, once the facts are determined. Therefore, we attempt to analyze the facts in the following order:

(1) Summary of the conspiracy and how it worked.

(2) Facts on the face of the Circuit Court of Appeals' opinion showing conspiracy.

(3) Further documentary facts in the record showing conspiracy.

(4) Forgeries condoned and excused by the opinion below.

(5) Notice and demand on Respondent not to pay out, as shown by opinion and record.

(6) Applicable law.

SUMMARY OF THE CONSPIRACY AND HOW IT WORKED.

The conspiracy, though complicated in performance, can be simply stated. The old man invested this $29,000.00 in these annuity contracts and intended to have them payable at his death to *two* men as *trustees* because "he

wanted one to watch the other," as the opinion correctly says at R. 360. These men were his trusted business associate and country banker, Sheppard, and this second cousin, Charles Lester Thomas. He had a memorandum drawn up at Respondent's home office and left it with the company or its agent Holliday, directing how these two trustees should disburse the money which they would receive on these contracts at his death, namely: $500.00 to a cemetery, and some small gifts to his "poorer relations", and then they were to turn over the balance of the money to his estate. Then, after going through administration, it would go to his niece and sole heir, Ruby Mayfield, by inheritance. He declared before death that he did not intend to leave a will and he left none. *This was the layman's way which this old farmer adopted* to make some gifts out of this $29,000 at death and have the rest of it go to his niece, without making a will. He acted without an attorney in carrying out this plan. He allowed the crooked insurance agent, Holliday, to handle all the paper work. *The contracts were in such form that the payee of the* $29,000 *could be changed merely by getting the old man's signature on small printed riders* which were later pasted on the backs of the contracts. This furnished an opportunity for stealing this tempting pot of money after the old man's death, and the agent, Holliday, and the second cousin, Charles Lester Thomas, *conspired* to do so. By a series of deceptions and forgeries they got Sheppard's name off the first three contracts as co-payee, and got the last two contracts issued directly in the second cousin's name, without the old man knowing what they were up to, so that when he died all the contracts, totaling $29,000.00, were apparently payable to the second cousin for his own use as a *gift* from the old man. Shortly after his death *the estate's attorney suspected that something was wrong*

and made written and oral demand on the insurance company's *home office* to hold up payment to the second cousin until the attorney could investigate, which the home office promised to do, but *in violation of the demand and promise it went ahead and paid out* to the second cousin who pocketed the money as his own, or more likely split it with his co-conspirator, Holliday, since the $29,000.00 of cancelled checks in evidence show that the second cousin did not deposit them according to normal business practice but ran around the countryside and cashed one check in each of four different towns (R. 311-314).

Greater scrutiny of the facts is needed in this case than in the average civil case because of the unusual nature of the case,—civil conspiracy involving a long series of demonstrated forgeries, *plus the fact that the old man is dead, thereby protecting the wrong-doers from exposure by him* and leaving no means of remedying the wrong except the diligence of his estate's counsel to dig out, and the sagacity of the Court and scrutinize, the circumstantial evidence which the conspirators left behind them. Conspiracy, civil or criminal, is by its nature designed to fool the investigators and courts. It usually can be exposed and proven in court only by circumstantial evidence, as this Court has often said in previous opinions. Many criminal convictions have been upheld in this Court, and men sent to prison, on evidence no stronger than we presented in this record, as shown in the argument following.

The consequences of an erroneous appraisal of the facts in this case are more serious from a standpoint of administering justice than in an ordinary civil action.

FACTS ON FACE OF OPINION BELOW SHOWING CONSPIRACY.

Peculiar and incongruous facts appearing on the *face of the opinion* indicate that a serious mistake has been made in holding there was no trust, no fraud, no conspiracy, and in placing the Court's approval on this thing:

(a) The opinion holds that this old man intended to make a *gift* of this $29,000.00 in cash to this second cousin whom he had taken in and given shelter merely because, as the opinion states, "he would do it for a dog." (Opinion, R. 360 top). It is a matter of common sense and common knowledge that decedents do not normally give $29,000.00 in cash to a person for whom they have no greater affection than this, particularly when this sum comprised approximately two-thirds of the old man's entire property and was nearly all the cash which he had accumulated in a lifetime. To this should be added the fact referred to in the opinion at R. 362, that this second cousin occupied the role of a *hired man* to the decedent, being hired at a dollar a day and board and room to take care of decedent's livestock, and he filed a sworn claim to that effect in the estate (R. 292).

(b) A further significant fact on the face of the opinion is decedent's statement only a couple of months before he died that "he was going to *give* Lester (the second cousin) $4,000.00 or $5,000.00 to buy the Thomas homestead" (Opinion, R. 360, bottom) (R. 126, top). If the old man knew that these contracts had been fixed so as to *give* the second cousin this $29,000.00 for himself, why was he talking in terms of *giving* him $4,000.00 or $5,000.00 just before his death?

(c) Again, how reconcile the old man's deathbed statement to this second cousin? The opinion says that "de-

cedent told Lester (second cousin) to get Sheppard, that he hadn't finished his business yet, and if he didn't get Sheppard he, Lester, *would be clear out.*" (Opinion R. 361, top) (R. 120). Sheppard was the original co-payee with Lester on these contracts before the beneficiary was changed to make them payable to Lester alone (Opinion R. 358, top) (R. 258, 261). If the old man knew that the contracts had been fixed so that Sheppard was off of them and that Lester was to get a gift of this $29,000.00 at death, why this deathbed statement to Lester that he "would be clear out" if he didn't get Sheppard?

(d) The opinion also shows that the old man *did in fact execute a memorandum* in the Kansas City Life Insurance Company's *home office,* and he *left it with the company.* The memorandum stated "what he wanted done".

> "He further said he was not going to make a will, but that he had made a memorandum and *left it with the Kansas City Life Insurance Company,* and in that memorandum it would tell just *what he wanted done;* that when the time came *Charlie Sheppard* would know what he wanted done, he would tell her what to do. (Our emphasis.)
>
> Opinion, R. 360, bottom. R. 126.

> "A few days after the death of Reuben Thomas, plaintiff was in the probate court of the county. Holliday came in, laid down a white paper and told the judge it was the paper Reuben Thomas *executed in the office of the Life Insurance Company* in Kansas City, and left with him, Holliday, as a *memorandum* of what decedent *wanted done.*" (Our emphasis.)
>
> Opinion, R. 361. R. 322, top.

Clearly, this must have referred to what he wanted done with the proceeds of these annuity *contracts;* other-

wise, there would be no point in executing it in the *insurance company's* home office and leaving it with the company or its agent. He would hardly go to the insurance company's home office and execute a memorandum regarding his land or livestock. The law of inheritance would transfer those things to his sole heir, Ruby Mayfield, in accord with his expressed desires, without any memorandum. The only thing for which a memorandum would be *needed* was the proceeds of these contracts,—this money which according to his views he had "loaned" the insurance company. If this second cousin was to get the proceeds of these contracts as a *gift* for himself as appeared in the face of the change of beneficiary riders —if there was no *trust* of this money—*why would decedent execute the memorandum at all?* Why not let the contracts speak for themselves? And why was it *executed* in the Kansas City Life Insurance Company's home office? And why was it left with the insurance company or its agent?

(e) How can the court below, or anyone reading the opinion, reconcile the peculiar circumstance appearing *on the face of the opinion,* that the old man was talking about having "*two* men *on* these contracts" so that one would "watch the other" and that these two men would know what he wanted done with the money after he was through with it—when Sheppard had *already* been taken off long before and the contracts were then payable solely to *one* man,—the second cousin? The opinion says at R. 360:

> "Decedent went to Indiana to visit plaintiff in 1939. On that visit he had a conversation with plaintiff in which he spoke of the banks all closing and said he had *loaned* some money to the Kansas City Life Insurance Company and taken out some contracts as they would bring in more interest; that *he*

> *had put two men on these contracts as he wanted one to watch the other;* that when he was done with it these *two* men would know what he wanted done with his estate, *they* would know how he wanted it handled." (Our emphasis.)
>
> Opinion, R. 360, middle. R. 120 bottom, 121 top.

Actually, Sheppard had been taken off the first three contracts *long before on November* 20, 1936 (R. 261, middle) and a fourth contract had also been issued directly in the second cousin's name on the same date. This date sufficiently appears from the opinion at the top of R. 358, although the year of the fourth contract is erroneously stated as 1935 instead of 1936.

If the old man *knew* and *intended* that these contracts had been switched so as to take Sheppard off as co-payee and make them payable to the cousin alone on November 20, 1936, why was he talking about having these *two* men still on the contracts long *afterward;* as shown in the above-quoted part of the opinion? The opinion erroneously gives the date of that declaration as 1939 when in fact it occurred in September, 1937, (R. 120, 121), but the correct date still was *long after* Sheppard was taken off the contracts.

FURTHER DOCUMENTARY FACTS IN RECORD SHOWING CONSPIRACY.

The opinion does an injustice to the Court, as much as to plaintiff, by overlooking and remaining silent on *crucial facts* which prove this *conspiracy.* The Court is as much concerned as plaintiff is over the proposition that if a fraudulent conspiracy was in fact carried out, *it should not receive the Court's stamp of approval through any failure to analyze and detect the clues.* Either a conspiracy existed, as we think the record shows, or none existed.

This case, unlike cases of negligence and other unintentional torts, is either black or white. If it is black and the opinion calls it white, then the conspirators have made the unusual accomplishment of fooling the federal court. By inadvertently leaving out these crucial facts, *the opinion breaks up the chain of circumstantial evidence* and gives the conspirators the benefit of making their acts look like innocent *disconnected* events. These links omitted from the opinion are:

(a) Survivorship clause: The opinion at the top of R. 358 omits the important fact that the first two contracts were made payable to the second cousin and Sheppard, a business associate, "*or to the survivor.*" (R. 258 middle, 259 top.) The opinion also omits to mention Sheppard's testimony that he had no reason to expect a *gift* of this money and understood that his name was placed on the contract as some kind of *trustee.* (R. 177, 179, 182.) If Sheppard was named as a trustee, it seems evident that the cousin was equally a trustee. They were co-payees, in similar capacity, under a survivorship clause. This circumstance appearing on the face of the contracts themselves *characterizes* this thing as a *trust* at its *inception.* We respectfully submit that it was a mistake to overlook and omit this highly important fact from the opinion.

(b) How they got Sheppard off: Also omitted at the top of R. 358 of the opinion is the important fact that the agent, Holliday, and the second cousin went to Sheppard, in the *absence* of the old man, and *falsely* stated to Sheppard that the insurance company wanted Sheppard to get off the contracts as a co-payee so that there would only be *one* payee; whereupon Sheppard, who realized that he was only named as trustee, signed a paper consenting to get off the contracts. It does not matter whether it was essential for Sheppard to sign

such consent. The important point is that the two conspirators *thought* it was essential and *took this first step in concert* to carry out their conspiracy to get these contracts in such form that the cousin could collect the money and put it in his own pocket when the old man died.

The falsity of the above statement to Sheppard is demonstrated by the fact that *later* the company willingly put two payees, Ruby Mayfield and the cemetery association, on contract "C" at the instance of these same conspirators, Holliday and the second cousin.

R. 339, bottom, 341 top.

Another plain and decisive inference arises from this episode of getting Sheppard to sign off: The second cousin and Holliday *knew* that Sheppard and the cousin were to get this money only as *trustees*. They would not have had the unmitigated gall to ask Sheppard to sign off on these contracts for $4000.00 and $12,000.00 if he was to get the money as a *gift* for himself. Sheppard testified:

> "Yes, the Agent, Mr. Earl Holliday and Mr. Thomas came in, Mr. C. L. Thomas I mean, and said that the Company didn't want to carry the insurance with *two names* and if it was agreeable to me, they would like to have me release,—have my name released as *fiduciary* I thought it was; I never knew it was beneficiary."

R. 177 middle.

(c) Forgeries: When the opinion mentions the forgeries of the old man's signature at the bottom of R. 361, it omits the important fact that the agent, Holliday, and the second cousin, Charles Lester Thomas, *collaborated* on *each* of the forgeries, namely:

(1) The opinion merely says that the old man's signature on the $500.00 assignment was "not writ-

ten by him." It omits to say that the old man's name was written *by* this *second cousin* and that right *beside* this forgery appears the signature of the agent, Holliday, attesting the forgery as genuine. This is obvious on the instrument which was sent up as an original exhibit and is pictured in the record (R. 267, middle) and was proven by the hand-writing expert's testimony (R. 212, 214).

(2) The opinion at the bottom of R. 361 recites that after Sheppard's name had been taken off the contracts so as to make them payable to the second cousin alone, Holiday signed the old man's name on a receipt for one of the policies. (R. 332.) It omits to say that the *cousin* a few days earlier *also* forged the old man's name on a *similar* receipt for another contract and made a studied attempt to *imitate* the old man's signature. (R. 331, 228-229.) This omitted fact is important because it shows the two conspirators *collaborating* in the enterprise of keeping the old man from having to receipt for, or examine, these changed contracts when they came from the insurance company's home office back through Holliday's hands after the beneficiary had been changed to the cousin alone.

(3) When the opinion at the bottom of R. 361 mentions the fraudulent letter by which Holliday and the second cousin obtained one of the contracts from Sheppard's care in order to make the $500.00 alteration, the opinion correctly states the Holliday signed the old man's name to the letter, and then goes on to say that the letter was "signed" by the cousin. The opinion omits the important fact that the *body* of the letter was *written by* the cousin, after which Holliday forged the old man's signature on it. (R. 329.) Here again is evidence of *collaboration* by the conspirators in a third forgery.

Although the undisputed record shows that the conspiring agent and second cousin *collaborated* in all three of the above forgeries, *the opinion does not mention any collaboration* on any of them. *Concerted action* between

conspirators is one of the important elements of every conspiracy, civil or criminal.

(d) The Box: The opinion at the top of R. 364 refers to the fact that some of the contracts were in the old man's box at the time of his death (erroneously stating that one was missing when in fact two were missing). The opinion infers that the old man must have known and approved the change of beneficiary because the contracts were in his box. But the opinion omits the important fact that this old fashioned tin box was in Sheppard's care, in Sheppard's bank, that Sheppard was the *keeper of the key* to it, (R. 165, top), that the agent and second cousin had on at least one occasion gotten access to the box by a forged letter above described. (R. 329.) There is no evidence in the record to show that any one of the contracts actually passed through the old man's hands after the beneficiary was changed. On the contrary, the jury could draw a plain, legitimate inference from these facts, plus the forged receipt cards, that the old man may never have had the contracts in his hands after the contracts were fixed so as to be payable to the second cousin alone. Yet the opinion fails to mention either this inference or the facts raising the inference.

(e) Form of contracts conducive to fraud: Relating to the last-mentioned point is another important circumstance which the opinion omits, namely: the original contracts and the riders subsequently attached are in such *form* that even if they did pass through the hands of this old man he might well have failed to discover the switch in the payees. The names of the original payees are buried in the body of the print on the first page of the contract (R. 258, middle), while the riders are small slips of paper in small type pasted on the back of the contracts so it would take a good lawyer to detect this change, (R. 267), much less a man eighty years old of such limited education that he could barely write an intelligible letter. (R. 291.) The opinion

indicates that the old man was so feeble the last two years of his life that he had difficulty in writing at all because his hand became "wobbly." (Opinion, R. 360, top.)

(f) Contract "produced" by agent: Though the opinion at the top of R. 364 mentions that one of the missing contracts was "produced by the agent of the company" (being the one bearing the $500.00 forged assignment to the cemetery), the opinion fails to mention the peculiar and astonishing fact that when the agent "produced" this contract this $500.00 forged rider which had originally been pasted on top of an earlier rider, *had been removed and pasted under one of the earlier ones so as to conceal the forgery,* and apparently this had been done by Holliday who was the only person who had possession of it during that interval. (R. 141, 168.) This illustrates the danger of omitting such essential facts. Here at the top of R. 364 of the opinion is a statement of *one part* of the episode which makes it look *innocent* and which the opinion actually uses to argue for innocence on the part of these conspirators in the preceding sentence. Yet, if we add the omitted part of the facts, we find that it adds up to an astonishing piece of evidence of the two conspirators' guilt. Please bear in mind that this rider which was covered up is the same one on which the second cousin had forged the old man's name and Holliday had also signed the same rider, witnessing, attesting his co-conspirator's forgery as genuine. (R. 267, middle.)

(g) Altered serial number: The opinion also omits the important fact that the change of beneficiary rider on the $17,000 contract bears an *altered serial number*—the number originally being that of the $4,000 contract and having been changed to the serial number of the $17,000 contract. This alteration, proven by our handwriting expert, stands entirely unexplained by defendant. (R. 330, picture, R. 225, 226.)

(h) Riders signed in blank: The opinion also omits the important circumstance that these change of beneficiary riders appear on their face to have been *signed in blank* by the old man and filled in afterward on a typewriter so as to take Sheppard off and make them payable solely to the second cousin. This appears on the face of the riders on the backs of the contracts. All these riders were identical in form and manner of execution with the one pictured at the bottom of R. 267, except for the mutilation.

(i) Riders conducive to fraud: The opinion also omits the important circumstance that these riders do not state the amount of the contract which is being changed, but merely identify it by serial number which is capable of being altered, as one of them in fact was. (R. 265, middle. R. 330.) Signing one of those slips was like signing a blank check (R. 267) for the amount of the contract,—hazardous business for anybody, much less an eighty year old man surrounded by two conspirators, one of whom was the insurance agent whom he was trusting.

(j) Riders mutilated: The opinion omits the circumstance that the three riders attached to the contract involved in the $500 forged assignment to the cemetery were *mutilated*, due to the fact that someone, apparently Holliday, removed and re-pasted them so as to cover up the $500 forged cemetery assignment. The opinion at R. 358 erroneously says that "after his death these riders were *found with*" the contract. The evidence shows that at the time of the old man's death Holliday had this contract in his possession (R. 140, top) and produced it only under pressure from the Probate Judge, (R. 141, top), and when he produced it these riders were not "found" with it loose as they now appear, but had been removed and re-pasted, apparently by Holliday, so as to cover up the forgery. (R. 168, middle.)

(k) Agent's attempt to conceal forgery: Though the opinion at the top of R. 364 states that the last mentioned contract "was produced by the agent" and implies that this shows *innocence,* the opinion omits the astonishing fact that this agent, Holliday, *made strenuous efforts to avoid having plaintiff or the estate's attorney see this contract at all* which bore the $500 forged cemetery rider. First, he offered to get $8,000 for her instead of the $7,500 which the contract called for, *if she would sign a release of the contract without seeing it.* He came to her and said:

> "This is the release, Ruby, if you will sign it I will get your money right away, *the Eight Thousand Dollars Mr. Reub wanted to leave you.*" (R. 139.)

She refused, and the estate's attorney demanded that Holliday turn this contract over to the Probate Judge, which Holliday promised he would do the next day. However he stalled for a week and only delivered it under pressure from the Probate Judge. When he did deliver it he "handed the policy to us and *rushed right out.*" Then the $500 forged rider was found attached to the contract but transposed and covered up in an attempt to conceal it. (R. 140-141, 168 middle.)

Why did Holliday offer to "get" her $8,000 instead of $7,500 if she would sign a release without seeing this tampered-with contract which was in his office safe? Where did he expect to "get" this extra $500 to give her? The contract then only called for the company to pay her $7,500. The conspiring agent and cousin would have to dig up this $500 out of their own pockets. Why would they do that if they were innocent?

FORGERIES CONDONED AND EXCUSED BY OPINION BELOW.

The opinion condones a number of unexplained forgeries and manipulations by the two conspirators as above shown in paragraphs (b) to (k), sometimes by *omitting* the connecting links, and sometimes by outright *excusing* of the forgeries as *harmless.*

At the bottom of R. 363 the opinion refers to the old man's signature on the $500 cemetery assignment and on certain receipts as being "not genuine." The opinion then goes on to excuse these forgeries by saying "these alleged forgeries do not show an intent on the part of Charles Lester Thomas to defraud plaintiff, nor was she injured in any way by *them.*"

This action is not to recover specific damages caused by any one of those forgeries *as such.* This is a civil *conspiracy* case. The forgeries were shown as *evidence,*—as links in a conspiracy to enable the second cousin to conceal the trusteeship and to enable him to misappropriate this $29,000.

In a civil case where plaintiff predicates liability directly on the forgery, plaintiff makes out a *prima facie* case of *forgery* merely by proving that the signature is not genuine (*Foster* v. *Graf,* 1919, 287 Ill. 559, 122 N. E. 845, 847), and this should be even more true where the forgeries are offered as part of the chain of circumstantial evidence in a conspiracy case, in view of the further rule that even in a criminal conspiracy case, "the crime is frequently established as a result of *inferences* drawn from the acts of the person accused" (*U. S.* v. *Holt,* C. C. A. 7, 108 Fed. (2d) 365, 638), and the further rule that in taking a civil case from the jury, as was done here, all *inferences* are indulged which it would be possible for reasonable men on the jury to draw in plaintiff's favor (*Worcester* v. *Pure Torpedo Co.,* C. C. A. 7, 140 Fed. (2d) 358, 361).

The opinion also condones the peculiar and unexplained circumstance mentioned at R. 361 that Holliday exhibited a *yellow* paper with a *pencil* signature just before the old man died as being the memorandum which the old man had left with him, (R. 130), and then immediately after his death Holliday exhibited a different *white* paper with a *pen* signature to the Probate Court as being the *same* memorandum (Opinion, R. 361) (R. 138, bottom). We proved by the handwriting expert that Holliday had written in conflicting provisions into the body of the white paper over the old man's signature. (R. 240. R. 321 picture.)

In the face of this apparent switching and tampering with the memorandum, the opinion *excuses* it by saying: "The testimony of the expert concerning the white paper proves nothing * * *. *Three* different typewriters were used on it, but that *signifies nothing.* * * *" (Opinion, R. 364, top.) The use of *three machines* to type a short half-page memorandum is itself a "significant" circumstance, particularly when the opinion previously states at R. 362 that the third machine was used on the paper *after signature.*

The opinion erroneously says that this suspicious looking memorandum makes a disposition of the old man's property just as plaintiff testified he wanted it to go. (R. 364.) Actually the only way the memorandum jibes with his expressed intention is in giving $500 to the cemetery. Peculiarly, this $500 gift to the cemetery was also the subject of another forgery—the forged assignment—which the opinion again excuses by saying that the old man intended such a gift. (R. 363, bottom.)

Why were the conspirators so anxious to carry out this cemetery gift? Because they knew that the old man had probably told the officials of the cemetery association that the gift was coming, and if it didn't come it would cause inquiry from these local men, which might expose the

whole conspiracy. And why were the conspirators at pains to produce some kind of memorandum? Because they knew that probably the old man had mentioned the existence of such a paper. So Holiday took pains to exhibit the yellow paper to relatives just before the old man died. (R. 130.) But when the doctor remarked that it was no good, Holliday produced a different white paper to the Probate Court a few days later. (Opinion, R. 361.) (R. 138.)

We ask the Court to have a look at this white memorandum (R. 321) and the expert testimony concerning it. (R. 236-242.) Contrary to the opinion's statement that it carries out the old man's declared intention, it makes no mention of any of the money he had "loaned" to the Kansas City Life Insurance Company except the $500. Why would the memorandum mention that small part of the money and not the rest? Contrary to the opinion's statement that Holliday owned all three of the typewriters which worked on this paper, (R. 362, middle), the expert testified that Holliday owned only the second and third machines which filled in the blanks,—the contradictory and illiterate language in the middle of the instrument. The first machine, of unknown origin and operated by a skilled and literate person, wrote the body of the paper including the words "I hereby bequeath *all* my personal and real property to." This form was suitable to use in giving the bulk of his property to Ruby Mayfield according to his expressed intention. (R. 238, bottom. 242, top). Then comes Holliday's machine filling in the blanks in self-contradictory and illiterate style—first giving *all* real and personal property to Ruby Mayfield and then splitting the personal property three ways between plaintiff, the conspiring second cousin and another second cousin. (R. 239 bottom.) Following this is still another contradictory gift of part of the person property, bank stock, to Sheppard, probably to quiet any inquiries by him. Hol-

liday, in doing this job, erroneously described the old man's farm as containing 320 acres, when in fact it was 360 acres—a fact which the old man would have noticed if this language had ever been read by him. The expert testified that all of Holliday's typing on the paper was put on after the old man signed it. (R. 240, bottom.)

Though the old man's signature on the white paper is genuine, it was *signed in blank* as the opinion says (R. 362, middle.) The opinion omits to mention the interesting fact testified by the expert that the white paper was *not signed on the date it bears,* April 15, 1940, but long before, *at the same time and with same pen and ink which the old man used in signing the three change of beneficiary riders,* which were used to take Sheppard off the first three contracts. (R. 238, middle.) These riders were signed November 20, 1936. An examination of these three riders shows that the old man apparently *signed them in blank also,* after which the serial numbers and language changing the beneficiary from Sheppard to the second cousin alone was filled in on a typewriter, as above shown in paragraph (h). These riders were all identical with the one pictured at the bottom of R. 267, except for the latter's mutilation.

Also on the same date, November 20, 1936, Holliday obtained the old man's signature on a *blank application* for an additional fourth contract. An examination of this application indicates that the old man signed it in blank at a time when Holliday had only filled in the amount $7,000 with pen or pencil, after which Holliday filled up this application so as to make the contract payable to the second cousin alone. (R. 277.)

Thus we have five papers apparently signed by the old man in blank on the same date, November 20, 1936, and afterward filled up over his signature—three change of

beneficiary riders, an application for a fourth contract, and the white memorandum paper. All were filled up in a way to *conceal and get rid of the trusteeship* of Sheppard and the second cousin regarding these contracts.

Certain it is that the old man did not *know* that these contracts had been fixed in the name of the second cousin alone on November 20, 1936, because long *afterward* he *declared:*

> "that he had put *two* men on *these contracts* as he wanted one to *watch* the other; that when he was done with it these *two* men would know what he wanted done with his estate, *they* would know how he wanted it handled." (Our emphasis.)
>
> Opinion, R. 360, middle.

The opinion, after seeming to condone the "alleged forgeries," (R. 363, bottom), and brushing aside the expert's testimony of the peculiar facts surrounding the white paper by saying it "proves nothing," (R. 364, top), says at its close that the old man's signature "on all the other contracts is genuine" (apparently referring to his signature on the three riders of November 20, 1936 and the application for the fourth contract on the same date, above discussed). From this premise, the opinion next concludes that "the defendant properly paid the amounts due on the other contracts to Charles L. Thomas". (R. 364, bottom.) But the opinion ignores the circumstantial evidence that these signatures were part of a set of five signatures which the old man *affixed in blank* on the same day, as above shown. It ignores the fact that the agent and second cousin collaborated in forging his name on receipts for these same contracts a few days later so that he would not see what had been filled in over these signatures, though this fact appears earlier in the opinion. (R. 363, bottom.) It ignores his subsequent declaration that he

still had two men on the contracts, one to watch the other, though this appears earlier in the opinion. (R. 360, middle.) It ignores the old man's declarations indicating slight affection for this second cousin, raising the inference that it is unlikely he would give him the major part of his fortune, though this appears earlier in the opinion. (R. 360, top.) It ignores all the other circumstantial evidence of conspiracy by the second cousin and agent, including the $500 forgery which the opinion itself mentions in the preceding sentence. (R. 364, bottom.)

While ignoring these things, the opinion focuses upon one piece of evidence, which appears innocent when *segregated* from the rest, and bases its conclusion on it. *This method would excuse every fraudulent conspiracy.* They all have many features which, when segregated, look innocent and legitimate. They have to have. Otherwise they would not succeed in their object and there would be no lawsuits to undo them. The investigating lawyer or judge needs always to view the suspected fraud or conspiracy in perspective, with particular attention to the details and circumstances which do not fit,—those which the conspirators could not, or in their haste or oversight did not, cover up,—else he will be successfully fooled by the conspirators.

Notice and Demand on Respondent Not to Pay Out, as Shown by Opinion and Record.

Regardless of whether the agent Holliday's knowledge would be imputed to Respondent, its *home office* had direct notice and warning before it paid out the money. *The opinion is self-contradictory on its face* on this subject. It concludes by saying:

> "But even if the evidence was sufficient to show the creation of a trust *or* the *conspiracy and fraud*

charged in the complaint, there is *no evidence of knowledge* by the defendant." (Our emphasis.)

Opinion, R. 364.

But how reconcile the above conclusion with the following statement earlier in the opinion:

"Some time afterwards, but *before defendant had paid out the money* on any of the contracts, plaintiff's attorney *told* an *officer* of the defendant the signature of the decedent on the rider which assigned $500 of the $8,000 remaining of the $12,000 contract to the New Lebanon Cemetery Association was *not the genuine signature of* Reuben Thomas; that as the signature on this assignment was a *forgery* he was asking the company to *withhold payment* on the *other* contracts *until he had time to examine them.*" (Our emphasis.)

Opinion, R. 361, next to last par.

On the face of the opinion, Respondent's *officer* (Secretary, Sears) was confronted by a *charge of forgery* on one of the contracts by the estate's attorney, and a *demand* that the company withhold payment on the other contracts until the attorney could examine them. In the face of that statement of fact in the opinion, how can the opinion conclude that there was "no evidence of knowledge by the defendant" that any conspiracy or fraud was on foot? *The opinion on its face condones a shocking piece of conduct by this company's home office* which the company did not choose to offer any evidence to explain. The opinion holds it was all right for defendant to pay out $29,000 in the face of such an unusual charge and such a reasonable demand.

But the uncontradicted evidence shows much more than the last quoted part of the opinion, namely:

(a) On October 14, 1940, three days after the old man

died, the estate's attorney sent a letter to defendant's home office demanding:

> "On her behalf, we are *asking that you do not make payment to any beneficiary* in any of the above policies until we can get the inventory completed and learn the true facts relative to Mr. Thomas' mental condition at the time the changes of beneficiary, if any, were made."
>
> R. 308.

(b) On October 29, as soon as the estate's attorney got hold of the $500 forgery, which was the first evidence uncovered of the *conspiracy*, the attorney and plaintiff went to defendant's home office and talked to its secretary, Sears, as follows:

> "Mr. Salveter just told the Company officials there that he had found what looked to him like a *forgery* on this contract, and he said, 'We have come in to call your attention to it.'
>
> 'Now,' he said, 'Owing to the fact (he said) we have talked this over, that this five hundred dollars is for a good cause, and it is to come out of the estate anyway, and Mrs. Mayfield is the sole heir, we are willing to overlook *it*, but (he says) you remember, gentlemen, *I wrote you* some time back and *told you to hold up on the payment of these other policies* until I had time to examine them.' He said *'That still stands*, because our sale is coming up and all our legal business at the Probate Court. *I have not had time yet to examine them. I want you to hold them up until I get time to look into them*, see if there is *anything that has gone wrong with them, too;* being as this *forgery* is on this one, *they may be tampered with too.'* "
>
> R. 143.

> "Before he finished, he said, Now, men, you remember sometime back *I wrote you a letter to hold up on the payment* on these *other* policies, and *that still stands,'* he says.

> He said, 'I haven't had time to examine them.' 'Now,' he said, 'Since we have found this skullduggery on this one'—after they admitted it was not his signature—he said, '*After we found this skullduggery on this, I want to examine them more than ever.* I haven't had a chance, haven't had time, and won't for some time, *so it still stands.*' and *they agreed;* they said 'All right; we see it is not his signature, and *that stands,*' or words to that effect."
>
> R. 168 bottom, 168 top.

(c) The above $500 forgery which the estate's attorney left in respondent's home office on October 29 showed not only that someone (the second cousin) had forged the old man's name but that its *own agent,* Holliday, was a party to the forgery because his signature is right beside the forgery attesting the forgery as genuine. (R. 267, middle.) Moreover, this $500 forgery had been *covered up* by removing it from the top of the stack of change riders and pasting it under an earlier one. (R. 168, middle.) Here was startling documentary evidence laid down in respondent's home office before its highest officials showing *forgery,* attempted *concealment* thereof and involving Respondent's *own agent,* who had also serviced all the *other* contracts.

At the time of the above notice, the pay-out checks had not yet reached the hands of the second cousin. He got them three days later, October 31, (R. 262 top, 265 bottom, 277 middle, 281 middle), and cashed them a week later, November 7 and 8. (R. 311-314). There was still plenty of time for Respondent to recall the checks from its agent, Holliday, to whom it had sent them, or to stop payment, but Respondent made no attempt to do so. This peculiar and unexplained inaction of Respondent enabled the cousin to pocket the money. Subsequent investigation by the estate's attorneys showed that fraud

did exist, just as the attorney had *warned* Respondent on October 29.

(d) Besides the above written and oral notice to the company after the old man's death, the opinion shows on its face that the company had notice that *some kind of a trust existed* concerning these contracts. This is proven not only by the old man's declaration two months before he died but also by the declaration of the company's agent to the probate court. The opinion says:

> "He further said he was not going to make a will but that he had made a memorandum and *left it with* the Kansas City Life Insurance Company, and in that memorandum it would tell just what he *wanted done,* that when the time came Charlie Sheppard would know what he wanted done. He would tell her what to do." (Our emphasis.)
>
> Opinion, R. 360, bottom.

> "A few days after the death of Reuben Thomas, plaintiff was in the probate court of the county. Holliday came in, laid down a white paper and told the judge it was the paper Reuben Thomas *executed in the office of the life insurance* company in Kansas City, and left with him, Holliday, as a memorandum of what decedent *wanted done.* * * * " (Our emphasis.)
>
> Opinion, R. 361, middle.

How can the court below conclude on page R. 364 of the opinion that "there is *no evidence* of *knowledge* by the defendant" that a *trust* existed, when the opinion has already made the above statements showing that Respondent-defendant should have known that a trust existed by the very fact that an instrument of that nature had been drawn up in the *home office* and *left* with the company? Clearly, this instrument must have referred to the *money* that would be paid on these contracts. Otherwise, why

leave it with the *insurance company* and its agents? That company had nothing to do with the old man's land, livestock, farm tools and other property. At least, that is a plain inference which the jury had a right to draw, and hence should be accepted by this Court, as against the directed verdict, under the well known rule. *This is particularly true where Respondent did not choose to offer any evidence explaining* this peculiar fact about the memorandum being drawn up and left in its home office, nor any evidence to rebut the inference arising therefrom, but moved to have a directed verdict at the close of Petitioner's case, thereby accepting all inferences which reasonable men on the jury could draw in her favor.

And how can the court below conclude at page R. 164 of the opinion "there is *no evidence* of *knowledge* by the defendant" that any *conspiracy* or *fraud* existed, when the evidence is undisputed that the estate's attorney laid down in front of its secretary and other officials a palpable forgery on the $500.00 rider which bore the signature of its own *agent attesting* the forgery as *genuine* and which its agent apparently had attempted to conceal by removing and repasting it so as to cover it up?

How can the court below justify the peculiar conduct of Respondent, which Respondent did not choose to explain, of paying out this money after being confronted by a demand by the estate's attorney that it withhold payment until he had time to investigate for suspected "skullduggery" on the other contracts?

And how explain the peculiar fact that the company on October 29 concealed from this attorney the fact that they had *already* issued checks on these contracts and sent them to the agent on October 26?

And how explain the peculiar fact that the company *promised* the estate's attorney on October 29 that they

would withhold this money from the second cousin in accord with his demand, which they had ample time yet to do because the agent did not deliver the checks to him until October 31, and yet the company violated that promise by failing to recall the checks?

How explain the fact that this company indulged in this peculiar, unbusiness-like procedure when confronted by these unusual and suspicious circumstances when all it had to do was to file an interpleader suit against the cousin and the estate's administrator and pay the money into court?

All the above unexplained questions appear on the face of the opinion at pages R. 360 and 361,—the existence of the memorandum in the company's home office and the demand of the estate's attorney before defendant had paid out the money on any of the contracts. We respectfully submit that this Court should not place its stamp of approval upon such a peculiar transaction, particularly where the company offered no explanation to the court below.

THE APPLICABLE LAW.

We believe that the principles of law applicable to the above facts are simple, resting on common sense and honesty, and need little elaboration.

Conspiracy Can Be, and Usually Has to Be, Proven by Circumstantial Evidence.

In this case the circumstances pointing to conspiracy are *numerous* and *cumulative*. One of them standing alone might have been considered innocent or accidental, but you do not find a *long series* of accidents all pointing to a *common end*. This principle was illustrated in the following decision of this Court where a criminal conspiracy

was held sufficiently proved by the *cumulative* effect of many details, saying:

> "The facts that appellant had *so many* stolen automobiles in his possession during the time covered by the evidence, and that the motor numbers had been changed on *so many* of the cars * * * were quite sufficient in conjunction with all other evidence submitted, to warrant the Court in submitting the case to the jury * * *." (Our emphasis.)
>
> *Lawrence* v. *United States* (C. C. A. 7, 1932), 56 F. (2d) 555, 556, Par. 3.

The last-named principle of the *cumulative effect* of numerous suspicious circumstances has been used in this Court and other courts to uphold convictions of high public officials for criminal conspiracy. The following case is where a deputy district attorney was thus convicted and the conviction upheld by the court, saying:

> "A conspiracy is an offense which is usually established by a *great number of apparently disconnected circumstances* which, when taken together, throw light on whether the accused have an understanding or are in common agreement." (Our emphasis.)
>
> *United States* v. *Glasser* (C. C. A. 7, 1940), 116 F. (2d) 690, 699, Par. 12.

This Court in the above *Glasser* case sustained the lower court's ruling on the *sufficiency of the proof* of conspiracy, though it reversed as to Glasser on the question of his right to independent counsel. This Court said:

> "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from *a development and collocation of circumstances. United States* v. *Manton, supra.* We are clear that from the circumstances outlined

above, the jury could infer the existence of a conspiracy * * *." (Our emphasis.)

Glasser v. *United States,* 315 U. S. 60, 80; 62 S. Ct. 457, 469, Par. 24.

Further illustrating the principle of cumulative circumstances is the well-known *Manton* case which this Court cited with approval in the last quotation. The Second Circuit Court of Appeals said:

"Indeed, often if not generally, direct proof of a criminal conspiracy is not available and will be disclosed only by a *development and collocation of circumstances.* In passing upon the sufficiency of the proof, it is not our province to *weigh* the evidence or determine the credibility of witnesses. We must take the view of the evidence most favorable to the government * * *." (Our emphasis.)

United States v. *Manton* (C. C. A. 2, 1938), 107 F. (2d) 834, 839, Par. 7, Certiorari denied, 309 U. S. 664.

Certainly, these two conspirators are entitled to no greater inferences in their favor than the defendants in the above criminal cases. In fact, they are entitled to less, because in this *civil* case it is only necessary to prove the conspiracy by a fair preponderance of the evidence, in contrast with a heavier burden of the government in a criminal case. As stated by the Tenth Circuit Court of Appeals in a civil case:

"Two well-established principles should be brought into view as the criteria for determining the contentions for respecting the sufficiency of the evidence. First, a *conspiracy to cheat and defraud* may be proved by *circumstantial evidence.* In the very nature of things the existence of conspiracy is generally a matter of *inference* deduced from the acts and declarations of the parties. * * * It is enough if the evidentiary facts

and circumstances—*pieced together are considered as a whole*—convince the judicial mind that the parties united in an understanding way to accomplish the fraudulent scheme." (Our emphasis.)

Hedrick v. *Perry* (C. C. A. 10, 1939), 102 F. (2d) 802, 806, Par. 2.

Trust Relation Between Payee and Decedent Was Sufficiently Proven, and Respondent Is Not Permitted to Attack the Relation, No Matter How Informally Created, If Respondent Knew or Was Charged With Knowledge of Its Existence.

This is basically a *conspiracy* case. The trust question is only secondary. It is one of the *ingredients* of the conspiracy. The payee conspired with Respondent's agent to divert trust money into his own pocket. Without elaboration, the following rules, applied to the facts above discussed, show that the trust was sufficiently proven for the purposes of this case:

(1) Such a trust (between decedent and payee can be created by words or **conduct** and no particular form is necessary,—the only thing necessary is manifestation of the settlor's intent.

Restatement—Trusts—Section 24.

Christensen v. *Christensen* (D.C. S.D. N.Y.) 14 F. (2d) 475, 476, par. 5.

Adams v. *Adams,* 88 U. S. 185, 21 Wall. 185, 22 L. Ed. 504, 507.

(2) Circumstantial evidence is admissible to show the settlor's *intention* to create a trust.

Restatement—Trusts—Section 24, page 74, par. (b).

Portland Cremation Assn. v. *Commr., Internal Revenue,* (C. C. A. 9), 31 F. (2d) 843, 846, pars. 2 and 3.

Walrath v. *Roberts* (D.C. N.D. Calif.), 31 F. (2d) 443, 445, pars. 4-7.

(3) Such a trust can be created without notice to or acceptance by the trustee.

Restatement—Trusts—Section 35.

Adams v. *Adams,* 88 U. S. 185, 21 Wall. 185, 22 L. Ed. 504, 507.

(4) The parol evidence rule does not prevent extrinsic evidence of the trust where there is a written instrument (such as these annuity contracts) which does not declare one way or another whether the payee is to get the money for his *own* use or is to hold it in *trust.*

Restatement—Trusts—Section 38 (3).

Walrath v. *Roberts* (D.C. N.D. Calif.), 31 F. (2d) 443, 445, pars. 4-7.

In re: McDonald (D.C. N.Y.) 175 Fed. 400, 407.

(5) The respondent cannot attack the validity of this trust as between the payee and decedent's estate on account of any informality in creation. Respondent can not argue that the trust was unenforceable between the parties. Only the parties to the trust—who were decedent (settlor), the cousin (trustee), and the estate (beneficiary),—could raise that question. Respondent was bound to *respect* the trust even though informally created if it *knew* or was *charged* with knowledge thereof.

Restatement—Trusts—Section 51.

Restatement—Trusts—Section 52.

Duty of Respondent Not to Pay Out to the Conspirators.

This Court has laid down the general principle that one who *assists* conspirators to consummate their conspiracy is liable to their victim if he knows, or is *chargeable* with knowledge, of the conspiracy. The Court further held that this liability can be proven by circumstances—even seemingly trivial ones when separately considered—and that it was error to take the case from the jury:

> "* * * *where there are surrounding circumstances, trivial,* it may be, *separately* considered, and the testimony in respect thereto contradictory, but the tendency of which is to *charge* the lender with knowledge of the wrongful purpose of the borrower, although there may be no direct and positive evidence of guilty knowledge,—a jury may be justified in holding that the loan was made with intent to consummate the wrong, and that the lender must share in the responsibility for the *result* of the wrong contemplated and accomplished, and which, knowingly, he *assisted* in accomplishing. We think, therefore, *there was error in withdrawing the case from the jury,* and that there was testimony justly demanding its consideration, as to whether the defendant Post was not *knowingly aiding* a fraudulent transaction. Even if he did not know the full nature and terms of the conspiracy, but *only knew in a general way that a scheme existed* by which the funds of the Connecticut Company were to be withdrawn wrongfully from its control, and *lent his aid,* for large consideration, to the accomplishing of such fraudulent transaction, we do not think he can avoid his liability by proof that the exact nature and full details of the scheme were not communicated to him. The judgment will be reversed, and the case remanded for a new trial."
>
> *Russell* v. *Post* (1891), 138 U. S. 425, (end of opinion), 11 S. Ct. 353, 355; 34 L. Ed. 1009.

Analogous to the above rule against aiding conspirators by paying out to them, is the following rule against aiding a conniving trustee by paying out to him, when the payor knows, or ought to know, that a scheme is on foot for the payee to misappropriate the money as his own.

The plainest rules of ordinary honesty and business common sense would dictate that when Respondent received the above knowledge that it was dealing with a fraudulent trustee, who was engaged in a program of *forgery* along with its *own agent,* coupled with the estate's *demand* that it not pay out the money to him, it should refrain from doing so. This common-sense rule is also a rule of law, as indicated by the following:

> "A person has notice of a breach of trust if (a) he *knows* or *should* know of the breach of trust * * *"
>
> Restatement—Trusts—Section 297.

> "If a third person *pays* or conveys to the trustee money or other property which the trustee as such is authorized to receive, and the trustee misapplies the money or other property, the third person *is liable for participation* in the breach of trust, if, but only if, when he made such payment or conveyance he had *notice* that the trustee was mis-applying or *intending to misapply* the money or other property."
>
> Restatement—Trusts—Section 321.

> "d. Payment with notice of breach of trust. If a chose in action is held in trust and the obligor pays the trustee with *notice* that the trustee is committing a breach of trust in receiving the payment *or* that he *intends to misapply* the money paid, the obligor is liable to the beneficiary therefor."
>
> Restatement—Trusts—Section 321, page 959, Paragraph (d).

Supporting the above text are cases from many jurisdictions, including the following:

Manhattan Life Ins. Co. v. *Cohen* (Tex. Civ. App.), 139 S. W. 51, 56, par. 2 (appeal dismissed, 234 U. S. 123) was a case where a life insurance policy was made *payable to* an assignee, but *decedent's estate* claimed the proceeds on the ground that special circumstances existed why the assignee was not entitled to the money, as in the case at bar. The insurance company paid out the money to the named assignee after having knowledge of the estate's asserted claim. The estate sued the insurance company for the money, as plaintiff has done here. The company put up the defense that it "was *authorized* to pay the amount due on the policies to Hilsman, the assignee" (page 56, par. 2) which is similar to defendant's answer in our case, that defendant paid to the named beneficiary "as it was required to do by the laws of the state of Missouri." (Tr. 45.) The court said that ordinarily the company would be authorized to pay to the named payee, but then went on to say what is highly applicable to our situation:

> "But that doctrine can have no application in this case. Here, as admitted by the defendant in the agreement upon which the case was tried, the insurance company *knew* when it paid Hilsman the face value of the policies that he claimed them as his own adversely to the estate of the insured; that as the owner he claimed he was entitled to the entire amount, less the sum of the loans due the insurer, as his own property, independent of the claims of the executor of the estate of Jacob Cohen; and that when paid to him that *he would hold the same as his own, without recognition of the trust* in favor of those who were equitably entitled to the benefit of such funds. In other words, with full *knowledge* of the *claim* of Cohen's *executor* to the amount due on the policies, and the ground upon which it was based, and that Hilsman denied the existence of the trust that equity charged him with, and of his entire repudiation of the same, and *that he would appropriate the proceeds* of the policy to his

own exclusive benefit in violation of the right of the insured's executor therein, it paid the face value of the policies to him, *thus aiding and abetting and enabling him* to acquire *possession* of money which the law charged it with knowledge that the fund belonged to the insured's estate, well knowing that Hilsman would hold it against the rights of the real owner. *The company's hands are not clean,* for they have given to one money to keep which it knew was not his, but another's. There are no waters nor lotions in a court of equity with which foul hands can be cleaned." (our emphasis.)

The same rule is laid down in the following cases; the first of which adds the corollary proposition that the rightful claimant of the money is not obliged to assume the burden and hazard of trying to recapture it from the hands of the person to whom the company wrongfully paid it, but that the company must pay to the rightful claimant and assume that burden:

O'Donnell v. *Metropolitan Life Ins. Co.,* 11 Del. Ch. 4, 95 Atl. 289, 290, par. 1.

McGrew v. *New York Mut. Life Ins. Co.,* 132 Calif. 85, 64 Pac. 103, 106 (Writ of error dismissed, 188 U. S. 291).

Metropolitan Life Ins. Co. v. *Lewis,* 14 Ga. App. 10, 80 S. E. 17, 18, par. 2.

Respondent's legal course was perfectly clear and simple when confronted by this demand and this notice. It should have recalled the checks from its agent's hands and paid the money into court in an interpleader suit. This was permissible under the laws of Missouri, its home state, where the demand was made and where both claimants then were:

"After the stakeholder has actually been *forbidden* by one of the claimants to pay over the fund to another * * * he is not bound to exercise any judg-

ment on the matter whatever, as to who is, or who is not, entitled, and is permitted to discharge himself by invoking the aid of the court in his bill'' (of interpleader).

Smith v. *Grand Lodge,* 124 Mo. App. 181, 101 S. W. 662, 669.

33 C. J.—Interpleader—page 433, Section 16.

30 Amer. Jur.—Interpleader—Section 5, page 216.

28 U. S. C. A. 41 (26).

The fact that the contracts on their face were payable to one of the adverse claimants (cousin) did not defeat the company's right to interplead the claimants, nor relieve it of the duty of answering to the rightful claimant if it ignored interpleader and chose to pay to the wrong one.

Love v. *Hartford Life Ins. Co.,* 153 Mo. App. 144, 132 S. W. 335, 337, 338.

C. Schmidt & Sons Brewing Co. v. *Pittsburgh Life etc. Co.,* 256 Pa. 363, 100 Atl. 959, 960, par. 2.

First National Bank v. *Reynolds* (1928), 127 Me. 340, 143 Atl. 266, 60 A. L. R. 712, 715, top, second col.

It has been expressly held that where a life insurance company sends a check to the beneficiary named in the policy, but is notified of an adverse claim before the check is cashed (as here), the company can stop payment on the check and interplead the payee and the adverse claimant.

Marsh v. *Mutual Life Ins. Co.,* 200 Ala. 438, 76 So. 370, 371.

Case Was for Jury—Petitioner's Constitutional Right to Jury Trial Was Infringed.

This is peculiarly the kind of case where a plaintiff is entitled to have, and the trial court should be glad to have, the finding of a jury upon this great mass of circumstantial and direct evidence. It is in the field of conspiracy, fraud, and human motives and conduct,—a field where the jury's judgment would be most valuable.

The error and injustice of taking such a case from the jury stands out on the face of the opinion below, where the court attempted to weigh the evidence, and a mere analysis of the circumstances stated in the opinion shows that the court unwittingly permitted a successful conspiracy to get by it.

> "It is the jury, not the court, which is the fact-finding body * * *. The very *essence* of its function is to select from among conflicting *inferences* and conclusions that which it considers most reasonable."
>
> *Tennant* v. *Peoria & P. U. Ry. Co.* (1944), 321 U. S. 29, 30, 35; 64 S. Ct. 409, 410, 412, pars. 7, 8.

The above was said in protecting the right of a plaintiff to a jury's determination of proximate cause in a negligence case. Petitioner urges that she is equally, or more, entitled to relief by this Court.

Petitioner, by direction of the court appointing her, has, at great labor and expense, exposed and proven this conspiracy which has cost this decedent's estate $29,000. If this effort and this great array of circumstantial and documentary evidence, including half a dozen proved forgeries by these conspirators, does not suffice to go to the jury,—then it is simply impossible for anybody to go to a jury in a civil conspiracy case. Men have been sent to prison

in criminal conspiracy cases upon evidence not nearly so complete and strong.

Therefore, it is respectfully submitted that the Petition for writ of certiorari should be granted.

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APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SEVENTH CIRCUIT.

No. 9104. OCTOBER TERM AND SESSION, 1946.

RUBY MAYFIELD, Administratrix of the Estate of Reuben Thomas, Deceased,
Plaintiff-Appellant,
vs.
KANSAS CITY LIFE INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

December 4, 1946.

Before SPARKS and KERNER, *Circuit Judges*, and HOLLY, *District Judge*.

HOLLY, *District Judge*. The complaint in this case consisted of ten paragraphs but prior to the trial plaintiff dismissed as to nine of the paragraphs and went to trial on the tenth.

Ruby Mayfield, administratrix of the estate of Reuben Thomas, is the niece and only heir at law of said Reuben Thomas who resided near Bunceton, Missouri, and died there on October 11, 1940. Prior to his death he had taken out five annuity contracts with defendant each of which provided for an annuity to Reuben Thomas and the payment of the principal sum of the contract to designated beneficiaries after his death.

The first of these contracts dated April 15, 1935, in the principal sum of $4,000, the second dated April 15, 1935, in the principal sum of $12,000 and the third dated October 15, 1935, for $17,000 were made payable after the death of Reuben Thomas, to Charles L. Thomas, a second cousin, and Charles M. Sheppard, a business associate. Later the beneficiary in these contracts was changed and they were made payable to Charles L. Thomas who was also the beneficiary in the other two contracts, one dated November 20, 1935, for $7,000 and the other dated April 15, 1937, for $5,000.

On April 16, 1940, Reuben Thomas withdrew $4,000 of the $12,000 invested in the contract of April 15, 1935, reducing the principal amount to $8,000.

After his death three riders were found with this contract. The first dated November 20, 1936, changed the beneficiary from Charles L. Thomas and Charles M. Sheppard to Charles L. Thomas. Another, dated April 15, 1940, changed the beneficiary from Charles L. Thomas to Ruby Mayfield, niece, and the third dated September 21, 1940, changed the beneficiary from Ruby Mayfield, niece, to the trustees of the New Lebanon Cemetery Association of Bunceton, Missouri, and Ruby Mayfield, $500 to be paid to the trustees of the New Lebanon Cemetery Association and the balance to Ruby Mayfield.

Defendant paid the principal sums of the contracts to the beneficiaries designated.

Plaintiff complains that the payment was wrongful and that she is entitled to recover from defendants the full amount of the principal sums of all of the contracts except the $500 assigned to the Lebanon Cemetery Association and certain sums withdrawn by Reuben Thomas in his lifetime.

She alleges as the basis for her claim that on or about April 15, 1940, decedent was at the home office of the defendant and that in the offices of certain of its executive officers and in the presence of Earl Holliday, its agent, and of said officers who are unknown to her Reuben Thomas executed a certain paper in the nature of a will, the terms of which directed the payment of the proceeds of said contracts to his estate, stating that they were assets of his estate for the benefit of Ruby Mayfield, his only heir; that he then and there with the knowledge of

defendant gave said instrument to said Earl Holliday and stated it was to serve as a memorandum directing the disposal of proceeds of said contracts by defendant. The contents of the instrument, she avers, are unknown to her but she has good reason to believe and states the fact to be that the said Earl Holliday, desiring to divert said contract proceeds from said estate to his friend and confederate Charles L. Thomas, concealed and destroyed said instrument about the time of decedent's death and forged a substitute either by forging decedent's name on the substitute or by writing in the terms thereof over some actual signature of the decedent which he had previously obtained on the paper.

Plaintiff further alleges defendant either knew of the execution of said instrument at its home office or was chargeable with such knowledge, and defendant's course of dealing with decedent relative to said contracts was such that Holliday held said instrument as defendant's agent; that the foregoing acts and facts constituted a change of beneficiary from Charles L. Thomas to decedent's estate and that defendant thereby became obligated to pay to the estate instead of to Charles L. Thomas.

Plaintiff further charges in her complaint that Charles L. Thomas as between himself and the decedent was a mere trustee of the proceeds of said contracts, charged with the duty of receiving and holding the proceeds thereof for the benefit of the estate of the decedent and that defendant knew or was chargeable with knowledge of such trusteeship by reason of the facts heretofore set out; that it was notified of the fact that said Charles L. Thomas was entitled to said money only as a trustee and not otherwise, but notwithstanding such notification it paid said monies to said Charles L. Thomas.

There is a further charge in the complaint that Holliday conspired with Charles L. Thomas to divert the proceeds of said contracts from the estate of the decedent to said Charles L. Thomas personally, that defendant is chargeable with knowledge of the conspiracy and through its payments of the proceeds of said contracts to Charles L. Thomas after the notice above mentioned it enabled the conspirators to defraud the estate.

Defendant entered a general denial of the charge of wrong doing on its part and lack of knowledge of the act of Holliday and Charles L. Thomas.

To sustain her case plaintiff, a resident of Indiana for sixteen years prior to the death of Reuben Thomas, testified that she and decedent corresponded by letter frequently until two years before his death when his hand writing became "wobbly". Charles L. Thomas moved in with decedent about 1933 or 1934. Decedent told Mrs. Mayfield in 1937 that Charles L. Thomas came to his house in a drizzling rain, said he could not live with his wife any longer and asked if he might come and live there. Decedent replied that he could but it was not because he was Lester Thomas but that the decedent would do it for a dog. Charles L. Thomas, generally spoken of as Lester Thomas, worked on the farm, but very little.

Decedent went to Indiana to visit plaintiff in 1939. On that visit he had a conversation with plaintiff in which he spoke of the banks all closing and said he had loaned some money to the Kansas City Life Insurance Company and taken out some contracts as they would bring in more interest; that he had put two men on these contracts as he wanted one to watch the other; that when he was done with it these two men would know what he wanted done with his estate, they would know how he wanted it handled. She spoke of having only a small place, five acres, and he told her to forget it, some day she would have plenty of land.

In August, 1940, plaintiff and her husband visited decedent at his home. As they were leaving he said to her that he had fixed the $8,000 he had loaned to the Kansas City Life Insurance Company so she would get it as soon as he died; that she knew she couldn't be administratrix of the estate, and the balance would have to go through administration; that he had made several gifts to some of the poorer relatives and he wanted the New Lebanon Cemetery Association to get $500 and plaintiff would get the rest, but it would have to go through the estate and it would be a year before she would get it; that he wanted the old homestead to go down in the Thomas name and he was going to give Lester 4,000 or 5,000 to buy the Thomas homestead back and he wanted it deeded so it would go down to his boys. He further said he was not going to make a will, but that he had made a memorandum and left it with the Kansas City Life Insurance Company, and in that memorandum it would tell just what he wanted done; that when the time came Charlie Sheppard would know what he wanted done, he would tell her what to do.

Plaintiff went to see decedent in his last illness. A few days before he died Lester walked through the room. Decedent told Lester to get Sheppard, that he hadn't finished his business yet, and if he didn't get Sheppard he, Lester, would be clear out.

On the question of the alleged fraud and conspiracy plaintiff testified that a few days before decedent's death Holliday drove to the Thomas home. Plaintiff was sitting on the porch with her husband and the doctor who was attending decedent. He, Holliday, spoke to all of them and said he had brought along a memorandum Reuben had left and wanted all of them to look over it and see if it was all right. It was a yellow sheet of paper. Her testimony as to its contents was excluded. The doctor looked it over and said it was not worth the paper it was written on as there were no witnesses.

A few days after the death of Reuben Thomas, plaintiff was in the probate court of the county. Holliday came in, laid down a white paper and told the judge it was the paper Reuben Thomas executed in the office of the Life Insurance Company in Kansas City, and left with him, Holliday, as a memorandum of what decedent wanted done. He thought it was his duty to hand it in as evidence of decedent's wishes. It was signed with ink and was not the yellow paper shown at the house.

Some time afterwards, but before defendant had paid out the money on any of the contracts, plaintiff's attorney told an officer of the defendant the signature of the decedent on the rider which assigned $500 of the $8,000 remaining of the $12,000 contract to the New Lebanon Cemetery Association was not the genuine signature of Reuben Thomas; that as the signature on this assignment was a forgery he was asking the company to withhold payment on the other contracts until he had time to examine them.

Herbert J. Walter, a handwriting expert, testified that the name Reuben Thomas on the assignment of the $500 to the New Lebanon Cemetery Association and on a receipt to the company for a contract on which the beneficiary was changed from Charles L. Thomas and Charles M. Sheppard to Charles L. Thomas was not written by Reuben Thomas. He further testified that the signature

on another receipt to the company for one of the contracts, after a change of beneficiary, was written by Holliday and that the purported signature of Reuben Thomas on a letter to Sheppard asking for delivery to Earl Holliday of the contract of which Ruby Mayfield became beneficiary was written by Holliday. This letter was also signed by C. L. Thomas.

He also testified that the white paper Holliday had delivered to the probate judge had the appearance of being carried around in someone's pocket for a considerable time; the folds in the paper had become pronounced and dirty; the sides of the creases were worn and the paper was cracked, so much so that when held up to the light you could see through it where the two horizontal folds went across the paper, and otherwise the paper showed signs of age. In his opinion three different typewriters had been used in writing the contents of the instrument. The first had been used in writing the formal parts of the purported will, except dates, etc. The second had been used to write the name Reuben Thomas in the body of the will, the names of Holliday as executor and of Charles M. Sheppard as his successor, and dates. The third was used in writing the body of the will except for the name of Reuben Thomas. It was his opinion that the third typewriter had been used after the paper had been carried around and become worn, while it had been signed at the time the formal part was typed, in other words had been signed in blank.

From examination of other work of Holliday he was of the opinion that all three machines were typewriters which Holliday had owned at different times.

For the purpose of showing the relationship between Charles L. Thomas and Reuben Thomas plaintiff put in evidence a claim filed by Charles L. Thomas against Reuben's estate in which he asked pay for care of breeding stock "under contract" at the rate of $1.00 a day and reimbursement for expense incurred at the time of an accident to decedent.

On this evidence the court directed a verdict for defendant. Plaintiff complains that the case should have been submitted to the jury.

The action of the court was correct. The evidence was not sufficient to sustain a verdict for plaintiff on either of the theories advanced by her.

First: As to the contention that Charles L. Thomas is a mere trustee holding the proceeds in trust for the benefit of Ruby Mayfield, personally, or for the benefit of the estate. The only evidence in the record which, by any possibility, could be said to sustain this contention is that of plaintiff in which she told of conversations with Reuben Thomas in which he indicated that he did not care for Charles L. Thomas and gave her to understand that most of his property, after his death, would go to her.

All he said to her was that he had fixed it so she would get $8,000 as soon as he died, that he was giving something to his poorer relatives and she would get the rest of the estate. These contracts were not a part of his estate and there is no word of testimony in the record showing that he intended any disposition of the contracts other than the proceeds should be paid to the designated beneficiaries.

The evidence was wholly insufficient to sustain plaintiff's theory of a trust. In *Trubey* v. *Pease*, 240 Ill. 513, 521, the court said:

"It is incumbent on the party asserting the trust to prove it by clear and satisfactory evidence. Whether a trust exists is to be determined from the proof, having in view all the surrounding facts and circumstances and the intention of the parties, and the proof must be clear and explicit. The words or acts relied upon as creating the trust must show clearly and unequivocally the intention of the donor to create a trust." See also *Updike* v. *Mace*, 194 Fed. 1001.

Second: As to the alleged fraud or conspiracy. To establish the allegations of her complaint on this subject plaintiff proved by a handwriting and typewriter expert that the signatures of Reuben Thomas on the application for change of beneficiary which gave $500 to the New Lebanon Cemetery Association and on certain receipts purporting to acknowledge receipt of the contracts after they had been sent in to the company to have the beneficiary changed were not genuine. These alleged forgeries do not show an intent on the part of Charles L. Thomas to defraud Plaintiff, nor was she injured in any way by them. That Reuben Thomas intended $500 to go to the New Lebanon Cemetery Association is admitted by plaintiff and she or her counsel said to defendant's officers they were waiving objection as to the disposition of that part of the proceeds of the contract.

As to the receipts upon which, it is charged, Reuben Thomas' name was forged, he did receive the contracts from the company and all the contracts but one were in his box when he died and that was produced by the agent of the company.

The testimony of the expert concerning the white paper proves nothing. It was old and, apparently, had been carried around in a pocket for a considerable time, but in whose pocket we do not know. It might as well have been the pocket of Reuben Thomas as any one else. Three different typewriters were used on it, but that signifies nothing. It directs a disposition of the Thomas' property just as plaintiff testified he wanted it to go. Whatever was done about this paper, it evidently was not for the purpose of defrauding plaintiff or the estate.

But even if the evidence was sufficient to show the creation of a trust or the conspiracy and fraud charged in the complaint, there is no evidence of knowledge by the defendant. Its agent Holliday may have been engaged in a conspiracy with Charles L. Thomas to defraud Mrs. Mayfield or the estate, but there is no evidence that any officer of the company had knowledge of that. Nor was notice of the trust brought home to the defendant. If a scheme was on foot to deprive plaintiff or the estate of some rights in the annuity contracts defendant's agent Holliday was a participant in the fraudulent scheme and under such circumstances notice to him is not notice to his principal. *Fountain & Herrington* v. *Mutual L. Ins. Co.*, 4 Cir., 55 Fed. (2d) 120, *Bacot* v. *South Carolina L. & T. Co.*, 127 S. E. 562.

Counsel for plaintiff requested defendant to hold up payments on these contracts but the only reason given was that the signature of Reuben Thomas on the assignment of $500 to the New Lebanon Cemetery Association of the contract in which plaintiff was the principal beneficiary was not genuine. It is admitted the signature of Reuben Thomas on all of the other contracts is genuine. The defendant properly paid the amounts due on the other contracts to Charles L. Thomas.

The judgment of the District Court must be affirmed.

AFFIRMED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 1254

RUBY MAYFIELD, ADMINISTRATRIX OF THE ESTATE OF REUBEN THOMAS, DECEASED,

Petitioner,

vs.

KANSAS CITY LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TOM LEEMING,
OWEN RALL,
RICHARD V. HENRY, JR.,
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Summary of Brief.

Statement.

The petitioner brought the present action under five anuity contracts issued by respondent. Respondent interposed no affirmative defenses to petitioner's complaint. At the close of petitioner's evidence, respondent moved for a directed verdict which was granted by the District Court. This action was affirmed by the Circuit Court of Appeals. Petitioner is seeking a further review of her evidence by this Court on the grounds that she has been deprived of her right to trial by jury and that the concurrent decisions of the courts below are contrary to public policy and the proper administration of justice 1

Argument.

I The petitioner's constitutional right to a trial by jury has not been infringed as the evidence which she introduced was insufficient to support a verdict in her favor and could lead to but one reasonable conclusion. This being the case, the District Court was required to direct a verdict in favor of the respondent, and the Circuit Court of Appeals properly so held. This result is not changed by Rule 50 (b) of the Federal Rules of Civil Procedure... 3

II. Neither public policy nor the proper administration of justice requires a further review of petitioner's evidence by this Court where both the District Court and Circuit Court of Appeals have reached the same result. The concurrent rulings of these lower courts evaluating petitioner's evidence are given great weight by this Court, and petitioner has shown nothing in her petition which forms a basis for disturbing them 5

List of Authorities Cited.

Cases.

Allen v. Pennsylvania Railroad Company, (C. C. A. 7) 120 F. (2d) 63 (1941) 3

Brady v. Southern Railway Company, 320 U. S. 476 (1943) 3

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Pennsylvania Railroad Company v. Chamberlain, 288 U. S. 333 (1933) 4

Reese v. Philadelphia & Reading Railway Company, 239 U. S. 463 (1915) 5

Tennant v. Peoria & Pekin Union Railway Company, 321 U. S. 29 (1944) 4

Tiller v. Atlantic Coast Line Railroad Company, 318 U. S. 54 (1943) 4

Worcester v. Pure Torpedo Company, (C. C. A. 7) 140 F. (2d) 358 (1944) 3

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT.

May it please the Court:

The present action involves five annuity contracts which respondent issued to one Reuben Thomas. Upon being furnished with due proof of his death in 1940, respondent paid out the proceeds due under each of the contracts to the beneficiaries named therein. Petitioner thereafter instituted the present action in which she asserted the payment to have been wrongful with respect to the four contracts in which Reuben Thomas' cousin, Charles Lester Thomas, was named beneficiary. Petitioner did not con-

test the payment under the fifth contract in which she was named a beneficiary and received the proceeds provided for by the contract.

In her complaint petitioner predicated her right to recover on three alternative theories (Rec. 40-44). In its answer (Rec. 45-46), respondent admitted several of the allegations and denied the remaining ones. The matter came on for trial before the District Court on these pleadings. It is to be noted that respondent raised no affirmative defenses and that therefore the burden of proof was upon the petitioner to prove the various facts upon which she relied for her alleged cause of action. At the close of petitioner's evidence, respondent moved for a directed verdict which was granted and judgment entered thereon.

Petitioner appealed from this ruling to the Circuit Court of Appeals for the Seventh Circuit, asserting that she presented sufficient evidence to enable the jury to find in her favor under either her trust or conspiracy theories. After reviewing the record, the Circuit Court of Appeals affirmed the action of the District Court in holding petitioner's evidence to be insufficient (158 F. (2d) 331; Rec. 357-364).

In her petition to induce this Court to assume jurisdiction of the matter, petitioner in substance states no more than that she is dissatisfied with the concurrent rulings made by the District Court and Circuit Court of Appeals with respect to her evidence and requests an examination *de novo* of the same by this Court. As a matter of form, she now asserts that these concurrent rulings deprived her of her right to trial by jury and that a result adverse to her is contrary to public policy and a proper administration of justice.

ARGUMENT.

I.

The Petitioner's Constitutional Right to a Trial by Jury Has Not Been Infringed.

We believe it to be a correct statement of the law that upon a defendant's motion for a directed verdict at the close of a plaintiff's evidence, the plaintiff is entitled to have credence given to all proper evidence offered by her and to the benefit of all inferences reasonably drawn therefrom.

Galloway v. *United States of America,* 319 U. S. 372 (1943).

Gunning v. *Cooley,* 281 U. S. 90 (1930).

Worcester v. *Pure Torpedo Company,* (C. C. A. 7) 140 F. (2d) 358 (1944).

Allen v. *Pennsylvania Railroad Company,* (C. C. A. 7) 120 F. (2d) 63 (1941).

If, however, plaintiff's evidence, in the light of this standard, is insufficient to support a verdict in her favor or could lead to but one reasonable conclusion as to the verdict, the trial court is required to direct a verdict in favor of the defendant, and such action does not deprive the plaintiff of her right to trial by jury. This Court stated the rule thus in *Brady* v. *Southern Railway Company,* 320 U. S. 476 (1943) at pages 479-480:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

See also:

Galloway v. *United States of America*, 319 U. S. 372 (1943).

Pennsylvania Railroad Company v. *Chamberlain*, 288 U. S. 333 (1933).

Patton v. *Texas & Pacific Railway Company*, 179 U. S. 658 (1901).

Such, we submit, was the ruling of the District Court judge in this case, after an evaluation of the evidence offered by the petitioner. Such was also the ruling of the Circuit Court of Appeals after a similar evaluation of petitioner's evidence. Admittedly the trial court judge should not go further and weigh the credibility of witnesses or conflicting evidence. These latter factors were the questions this Court had before it in *Tennant* v. *Peoria & Pekin Union Railway Company*, 321 U. S. 29 (1944) and *Tiller* v. *Atlantic Coast Line Railroad Company*, 318 U. S. 54 (1943) cited by petitioner.

Nor, we submit, has this result been changed by Rule 50 (b) of the Federal Rules of Civil Procedure. This Court stated in *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243 (1940) at page 250:

> "Rule 50 (b) merely renders unnecessary a request for reservation of the question of law or a formal reservation and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to rights of litigants heretofore existing and available through a more cumbersome procedure."

See also:

Galloway v. *United States of America*, 319 U. S. 372 (1943).

II.

Neither Public Policy Nor the Proper Administration of Justice Requires a Further Review of the Evidence in This Cause where Both the District Court and the Circuit Court of Appeals Have Reached the Same Result.

Petitioner of course does not agree with the evaluation that the District and Circuit Courts have made of her evidence. As a basis for this Court's assumption of jurisdiction, petitioner alludes to this disagreement and asserts it to be contrary to public policy and a proper administration of justice. She cites no authority for this novel proposition which we believe could be stated as the sentiment of every unsuccessful litigant.

With respect to the question as to whether this concurrent evaluation of the evidence by the District Court and Circuit Court of Appeals should be subject to further review, this Court has long held that such concurrent opinions should be given great weight. In *Patton* v. *Texas & Pacific Railway Company*, 179 U. S. 658 (1901), this Court had before it the question of the propriety of a District Court judge's action in directing a verdict for a defendant. This action had been affirmed by the Circuit Court of Appeals. After discussing the right to trial by jury and the full responsibility of the trial judge for the outcome of the trial, this Court stated at page 660:

> "He (the trial judge) has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this Court, when

> called upon to review the proceedings of both courts, will rightfully be influenced by their concurrent opinions."

This same result was reached in *Galloway* v. *United States of America*, 319 U. S. 372 (1943) and *Reese* v. *Philadelphia & Reading Railway Company*, 239 U. S. 463 (1915).

Petitioner in her petition and supporting brief has detailed to this Court the same evidence and arguments with respect thereto that she presented to the District Court and Circuit Court of Appeals below. We submit that she has shown nothing which would lead this Court to a different conclusion than that arrived at by both of these courts.

Conclusion.

WHEREFORE, respondent prays that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit be denied.

KANSAS CITY LIFE INSURANCE COMPANY,
Respondent,

By TOM LEEMING,
OWEN RALL,
RICHARD V. HENRY, JR.,
Its Attorneys.

Chicago, Illinois,
May 6, 1947.